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Family sues Hammond police officer for shooting dog within feet of 7-year-old child

HAMMOND, INDIANA, SEPTEMBER 2, 2014—Norma Maldonado and Dario Lemus, formerly of Hammond, filed suit today against the City of Hammond and police officer Timothy L. Kreischer for the June 9 shooting of their dog within close proximity of Maldonado's seven-year-old child.

According to the complaint, Hammond police officer Timothy L. Kreischer "unholstered his weapon, pointed it at [the dog] and [a 7-year-old child], and discharged it up to three times shooting [the dog] in the face." On June 10, Hammond Mayor Thomas McDermott, Jr. issued a statement on Facebook defending the officer's actions. McDermott's statement read, in part, that the dog "lunged at the HPD officer in an 'attack mode,'" but the family attorney says that it is simply untrue. "'Lilly' neither charged at nor lunged at the officer," said Trent A. McCain, the family's attorney. "Lilly was standing almost within arm's length of a seven-year-old when Officer Kreischer discharged his weapon from 15-17 feet away," added McCain. McCain said the 7-year-old being so close to Lilly is what really makes this shooting so egregious. "We all shudder to think what would have happened if Officer Kreischer missed," McCain said.

Trent A. McCain is the principal of McCain Law Offices, P.C. For four years, he worked for famed attorney, the late Johnnie Cochran in Chicago, before starting his own practice in 2005. McCain concentrates his practice in permanent and catastrophic personal injury, wrongful death, police brutality, medical negligence, and civil rights cases. His office is located at 5655 Broadway in Merrillville and he also practices in Illinois.

Attachment: Complaint

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION**

NORMA MALDANADO, individually and as parent and next friend of A.M and T.C., minors and **DARIO LEMUS**,

Plaintiffs,

V.

**CITY OF HAMMOND, Indiana and
TIMOTHY L. KREISCHER**, in his individual
capacity,

Defendants.

No. 2:14-cv-00310
JURY TRIAL DEMANDED

COMPLAINT

Plaintiffs, NORMA MALDONADO, individually and as parent and next friend of A.M. and T.C., minors and DARIO LEMUS, by counsel, Trent A. McCain of McCAIN LAW OFFICES, P.C., complain against Defendants, CITY OF HAMMOND, Indiana and TIMOTHY L. KREISCHER, in his individual capacity, as follows:

NATURE OF THE ACTION

1. This is a civil action arising under 42 U.S.C. §1983 and common law avenues of recovery for deprivations of Plaintiffs' rights against Defendants.
2. Plaintiffs sue the individual Defendant in his individual capacity.

JURISDICTION AND VENUE

3. Jurisdiction of this Court is invoked pursuant 28 U.S.C. §§1331 and 1343(a).
4. Venue is proper in this District, pursuant to 28 U.S.C. §1391, and because all the conduct complained of herein occurred in this District.

PARTIES

5. At all relevant times herein, Plaintiff, NORMA MALDONADO (“Maldonado”) was a resident of Hammond, Lake County, Indiana. She is the parent and next friend of A.M. and T.C., minors.

6. At all relevant times herein, Plaintiff, DARIO LEMUS (“Lemus”) was a resident of Hammond, Lake County, Indiana. Lemus is the registered owner of a 60-pound, female, mixed-breed dog named “Lilly.”

7. Defendant, CITY OF HAMMOND, Indiana (the “City,” “Hammond”) is a municipal corporation organized under the laws of the State of Indiana.

8. At all relevant times herein, Defendant, TIMOTHY L. KREISCHER (“Kreischer”) was a sworn officer of the Hammond Police Department. Upon information and belief, he is a resident of Lake County, Indiana.

COLOR OF STATE LAW

9. At all times relevant herein, Defendant Kreischer acted under color of state law.

10. Particularly, Defendant Kreischer acted under color of laws, statutes, ordinances, regulations, policies, customs and usages of the State of Indiana, and its political subdivisions.

FACTUAL BACKGROUND

11. On June 9, 2014, the family dog, Lilly, was 1 ½ years old.

12. On and before June 9, 2014, Lilly resided with Plaintiffs and their seven children at 6533 Jackson Avenue, Hammond, Lake County, Indiana.

13. At all times relevant herein, Lilly was contained within the boundaries of the Plaintiffs’ property by an “invisible fence.” Signs that read “BEWARE OF DOG—

DOG IS CONTAINED BY AN INVISIBLE FENCE” were conspicuously posted on the Plaintiffs’ property.

14. On June 9, 2014, Plaintiffs’ family was enjoying an outdoor barbeque with the family dog.

15. On that date, at approximately 3:15 p.m., the police were purportedly dispatched to Plaintiffs’ block to investigate a “loose dog.”

16. When Officer Kreischer arrived in front of Plaintiffs’ home, Lilly was standing within 5-7 feet to the right of minor child, T.C.

17. Minor, A.M. was leaning against the car parked at the end of the driveway on the south side of the house about 10-15 feet behind T.C.

18. From the sidewalk on the west side of Plaintiffs’ home, about 15-17 feet away from the house, Officer Kreischer unholstered his weapon, pointed it at Lilly and T.C, and discharged it up to three times shooting Lilly in the face.

19. Officer Kreischer claimed that Lilly was lunging at him when he shot her, but Lilly was within arm’s length of Maldonado’s minor child, T.C.

20. After shooting Lilly, Officer Kreischer did not seek medical attention for the critically wounded animal.

21. Despite being shot in the face, Lilly survived her wounds but will require future medical treatment.

22. Minor, T.C., was traumatized by having a gun pointed and fired in his direction and witnessing his beloved pet shot in the face.

COUNT I:
VIOLATION OF CIVIL RIGHTS 42 U.S.C. §1983 AND FOURTH AMENDMENT
AGAINST THE INDIVIDUAL DEFENDANT FOR COMPENSATORY DAMAGES AND
ATTORNEYS' FEES

23. Plaintiffs reallege all of the preceding paragraphs as if set forth fully herein.

24. The Fourth Amendment of the United States Constitution prohibits the government from unreasonably destroying or seizing a citizen's property.

25. "The destruction of property by state officials poses as much of a threat, if not more, to people's right to be 'secure...in their effects' as does the physical taking of them." *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994), overruled on other grounds, *Robinson v. Solano County*, 278 F.3d 1007, 1013 (9th Cir. 2002) (citations omitted).

26. The shooting of a dog is an unreasonable seizure under the Fourth Amendment and can constitute a cognizable claim under §1983. See *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962 (9th Cir. 2005).

27. Dogs are more than just a personal effect. *Id.* at 975 (holding that defendant police's shooting of plaintiff's dogs was an unreasonable seizure).

28. The emotional attachment to a family's dog is not comparable to a possessory interest in furniture. *Id.*

29. Indeed, Plaintiffs' Fourth Amendment interests involved are substantial because "the bond between a dog owner and his pet can be strong and enduring," and Plaintiffs think of Lilly "in terms of an emotional relationship, rather than a property relationship." *Altman v. City of High Point, N.C.*, 330 F.3d 194, 205 (4th Cir. 2003).

30. In circumstances where, as here, the dog does not pose an imminent threat, or the officer is not surprised by the dog and has had time to make alternate

plans to control the dog, other than shooting, the shooting of the dog has been found to be an unreasonable seizure. See *e.g.*, *Dziekan v. Gaynor*, 376 F. Supp. 2d 267, 270-71 (D. Conn. 2005).

31. Defendant Kreischer's acts described herein were objectively unreasonable allowing for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. See *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

32. Indeed, Defendant's acts described herein were intentional, grossly negligent, amounted to reckless or callous indifference to Plaintiffs' constitutional rights.

33. Defendant's premeditated shooting and attempted killing of Lilly was unreasonable under the totality of the circumstances and therefore constituted an unreasonable seizure under the Fourth Amendment.

34. Defendant's premeditated shooting and attempted killing of Lilly was more intrusive than necessary. *Florida v. Royer*, 460 U.S. 491, 504 (1983) ("A seizure becomes unlawful when it is 'more intrusive than necessary.'")

35. No governmental interest justifies the intrusion involved in this case.

36. The right to possess a dog is clearly established. *Leshner v. Reed*, 12 F.3d 148, 150-51 (8th Cir. 1994).

37. Defendant Kreischer's shooting and attempted killing of Lilly was objectively unreasonable because Lilly was merely barking and neither charged at nor lunged at the police officer.

38. Defendant Kreischer's failure to timely seek or obtain medical care for Lilly

was objectively unreasonable.

39. Defendant was not in any immediate danger that would have justified the use of deadly force. *Fuller v. Vines*, 36 F.3d 65 (9th Cir. 1994).

40. Evidently, the Defendant was unaware that Indiana law provides that it is not reasonable to attribute vicious propensities to a dog “merely because [it] barks at strangers” or “because a person is afraid of the dog.” *Royer v. Pryor*, 427 N.E.2d 1112, 1117 (Ind. App. 1981).

COMPENSATORY DAMAGES

41. Under 42 U.S.C. §1983, Plaintiffs are entitled to an award of compensatory damages against the individual Defendant in his individual capacity.

PUNITIVE DAMAGES

42. The individual Defendant’s actions were:

- a. Reckless;
- b. Showed callous indifference toward the rights of Plaintiffs; and
- c. Were taken in the face of a perceived risk that the actions would violate federal law.

43. Plaintiffs are entitled to an award of punitive damages against the individual Defendant in his individual capacity, in order to punish him and deter others.

ATTORNEYS’ FEES

44. Under 42 U.S.C. §1988, if Plaintiffs are the prevailing parties in this litigation, then they will be entitled to receive an award of reasonable attorneys’ fees, non-taxable expenses and costs.

WHEREFORE, Plaintiffs pray for judgment under 42 U.S.C. §§1983 and 1988 against the individual Defendant in his individual capacity, for compensatory damages in

a fair and reasonable amount, punitive damages, reasonable attorneys' fees, non-taxable expenses, costs, and such other relief as may be just under the circumstances and consistent with the purpose of 42 U.S.C. §1983.

COUNT II:
VIOLATION OF CIVIL RIGHTS 42 U.S.C. §1983 AND FOURTH AMENDMENT
AGAINST DEFENDANT CITY FOR COMPENSATORY DAMAGES
AND ATTORNEYS' FEES

45. Plaintiffs re-allege their prior allegations.

COMPENSATORY DAMAGES
FIRST ALTERNATIVE BASIS OF MUNICIPAL LIABILITY:
DELEGATION TO INDIVIDUAL DEFENDANT

46. As the first alternate basis for liability against Defendant City, the policy maker for Defendant, the mayor, or someone else, and that person delegated full authority and/or empowered the individual Defendant's policy.

47. That delegation of authority by the actual policy maker of Defendant City placed the individual Defendant in a policymaking position, and the acts of the individual Defendant may fairly be said to be those of the municipality. *Kujawski v. Board of Com'rs of Bartholomew County, Ind.*, 183 F.3d 734, 737 (7th Cir. 1999).

48. Those acts therefore subject Defendant City to liability for the constitutional violations of the individual Defendant. *Id.*

SECOND ALTERNATIVE BASIS OF MUNICIPAL LIABILITY:
FAILURE TO TRAIN, SUPERVISE, CONTROL

49. As the second alternative basis for liability against Defendant City, Defendant City failed to properly hire, train, supervise, control and/or discipline the individual Defendant with respect to dogs such as Lilly.

50. Defendant City was thus deliberately indifferent to the rights of others in

adopting its hiring and training practices, and in failing to supervise, control and/or discipline the individual Defendant such that those failures reflected a deliberate or conscious choice by Defendant City made from among various alternatives. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989).

51. Those deficiencies were the moving force that caused Plaintiffs' damages. *Larson By Larson v. Miller*, 76 F.3d 1446, 1454 (8th Cir. 1996).

52. In light of the fact that it was the individual Defendant who engaged in the constitutional violations, the need to correct the deficiencies is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of Defendant City can reasonably be said to have been deliberately indifferent to the need. *Andrews v. Fowler*, 98 F.3d 1069, 1076 (8th Cir. 1996).

53. If Defendant City had properly hired, trained, supervised, controlled and/or disciplined the individual Defendant, the constitutional violations committed by the individual Defendant would not have occurred.

54. These failures by Defendant City to hire, train, supervise, control and/or discipline the individual Defendant subject Defendant City to liability for the constitutional violations committed by the individual Defendants.

55. On information and belief, Defendant City had no policy or training in place in how to handle a barking dog, which was evident in Defendants' actions alleged herein.

56. Under 42 U.S.C. §1983, Plaintiffs are entitled to an award of compensatory damages against Defendant City.

ATTORNEYS' FEES

57. Under 42 U.S.C. §1988, if Plaintiffs are the prevailing parties in this litigation, then they will be entitled to receive an award of reasonable attorneys' fees, non-taxable expenses and costs.

WHEREFORE, Plaintiffs pray for judgment under 42 U.S.C. §§1983 and 1988 against Defendant CITY OF HAMMOND, Indiana for compensatory damages in a fair and reasonable amount, reasonable attorneys' fees, non-taxable expenses, costs and such other relief as may be just under the circumstances and consistent with the purpose of 42 U.S.C. §1983.

Respectfully submitted,

McCAIN LAW OFFICES, P.C.

/s/ Trent A. McCain

One of Plaintiffs' Attorneys

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JURY TRIAL DEMAND

Pursuant to FED. R. CIV. P. 38, Plaintiffs demand trial by jury in this action of all issues so triable.

Respectfully submitted,

McCAIN LAW OFFICES, P.C.

/s/ Trent A. McCain

One of Plaintiffs' Attorneys

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

NORMA MALDONADO, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	NO. 2:14CV310-PPS/PRC
	)	
CITY OF HAMMOND, INDIANA and	)	
OFFICER TIMOTHY KREISCHER,	)	
	)	
Defendants.	)	

OPINION

This is a §1983 case in which, according to the complaint, Norma Maldonado's dog (Lilly) was shot and killed by Hammond Police Officer Timothy Kreischer in the presence of two of Ms. Maldonado's minor children. One child was 5 to 7 feet away from the dog when it was shot, and the other was 10 to 15 feet away. Kreischer had been dispatched to Maldonado's residence to investigate a report of a "loose dog." When he arrived on the scene, Kreischer says that Lilly – an American Bulldog – lunged at him and Kreischer responded by shooting and killing the dog to stave off the attack. Maldonado claims that Lilly was posing no threat to the officer at the time of the shooting and that the shooting amounts to an unreasonable seizure under the Fourth Amendment.

Maldonado has sued Officer Kreischer in his individual capacity and also the City of Hammond. Maldonado's claim against Hammond alleges the city's liability based on its custom or policy resulting in her injuries. *Monell v. Dept. Of Soc. Services*,

436 U.S. 658, 691 (1978), holds that there is no *respondeat superior* liability against a municipality for the unconstitutional acts of its employees, but that a municipality may be subject to liability when the violation of a plaintiff's federally protected right can be attributed to a municipal policy or practice or the decision of a final municipal policy maker. *Id.* As the Supreme Court stated: "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694. Hammond has moved to dismiss the *Monell* claim under Fed.R.Civ.P. 12(b)(6), contending that Maldonado has failed to state a claim upon which relief can be granted.

Under *Monell* and its progeny, one basis for municipal liability is "where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants." *City of Canton v. Harris*, 489 U.S. 378, 389 (1989). *See also Rice ex rel. Rice v. Correctional Medical Services*, 675 F.3d 650, 675 (7th Cir. 2012); *Hollins v. City of Milwaukee*, 574 F.3d 822, 827 (7th Cir. 2009).

In her complaint Maldonado claims that Hammond is liable to her because Hammond's Mayor, Thomas McDermott, "ratified" Officer Breischer's conduct by defending it in a post on Facebook. In her brief in response to the motion to dismiss, Maldonado retreats from this theory of liability, perhaps recognizing that a municipality can only be subject to liability for ratifying unconstitutional acts if the person doing the ratifying is the final policymaking authority, as established by state law. *Darchak v. City of Chicago Bd. of Educ.*, 580 F.3d 622, 629 (7th Cir. 2009). Indiana state

law vests authority for police matters to the police chief, and not the mayor. *See* Ind. Code 36-8-3-3(g). So what Mayor McDermott may have said on Facebook about Officer Breischer's behavior is neither here nor there. Perhaps the Facebook post is *evidence* of an unconstitutional policy, but it is not a separate basis for liability under *Monell*.

The same goes for Maldonado's theory that Hammond failed to properly discipline Officer Breischer. While that may be *evidence* of an unconstitutional policy, it is not a separate theory of liability in the absence of evidence that the failure to discipline Officer Breischer actually caused Maldonado's injuries. *See, e.g., Thomas v. Cook County Sheriff's Dept.*, 604 F.3d 293, 306 (7th Cir. 2010); *Klebanowski v. Sheahan*, 540 F.3d 633, 637 (7th Cir. 2008).

But Maldonado has alleged more than just her ratification and failure to discipline theories. She has also alleged that the City of Hammond failed to properly train its officers in how to handle barking dogs, and this is a different theory of liability against the City. As noted above, a failure to train is a cognizable theory under *Monell*. *See City of Canton*, 489 U.S. at 388. In her complaint, Maldonado alleges that the "City of Hammond had no policy or training in place on how to handle barking dogs." (Complaint at ¶ 34). Hammond contends in its reply brief that the failure to train claim should be dismissed because Maldonado failed to use the precise words that the City was "deliberately indifferent" in its failure to train. But these are not magic words. The City well knows what the claim is and is in a position to defend against it.

Hammond argues that the allegations are too threadbare and therefore the case should be dismissed under the Supreme Court's Rule 12(b)(6) cases, *Twombly* and *Iqbal*.¹ To which I ask, what additional allegations would one expect to see? Proving a "failure to train" requires proof of a negative. The very essence of the allegation is that the City didn't do anything. So it is difficult to conceive of the "facts" that a plaintiff would allege when the very allegation is that the city did nothing at all. For now I am satisfied that Maldonado has alleged enough to avoid dismissal on her failure to train theory.

It is true that to establish liability under a failure to train theory, a plaintiff must be able to demonstrate the requisite deliberate indifference to the rights of persons with whom city employees come into contact, such as showing a pattern of a certain kind of constitutional violation or a lack of training when training was obviously needed. *Connick v. Thompson*, 131 S.Ct. 1350, 1359-60 (2011). But reliance at this stage on *Connick* is misplaced since it was decided after a full trial on the merits and is about sufficiency of *proof* rather than sufficiency of *pleading*. What is required to be pled is a different question.

The applicable pleading standard of Rule 8(a)(2) continues to require only "a short and plain statement of the claim showing that the pleader is entitled to relief," sufficient to give the defendant fair notice of what the claim is and the grounds the claim rests on. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). The Supreme Court has noted the different functions of pleading standards and summary judgment: "This

¹ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.” *Swierkiewicz*, 534 U.S. at 512. “A complaint that invokes a recognized legal theory (as this one does) and contains plausible allegations on the material issues (as this one does) cannot be dismissed under Rule 12.” *Richards v. Mitcheff*, 696 F.3d 635, 638 (7th Cir. 2012).

Maldonado alleges that the city had no training in place on how officers should handle barking dogs and that Kreisher was not disciplined for shooting Lilly. Where a total absence of training is alleged concerning as common and ordinary a scenario as barking dogs encountered on patrol, and lethal force was used with no apparent question of its appropriateness by the police department, I find that the failure to train claim (including facts in support of the deliberate indifference prong) has been pled with adequate specificity. To make the “context-specific” plausibility determination required by *Twombly/Iqbal*, I draw on my “judicial experience and common sense.” *Iqbal*, 445 U.S. at 679. I conclude that Maldonado has pled sufficient “details about the subject-matter of the case to present a story that holds together” and to permit a reasonable inference that the city is liable on a failure to train theory. *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010).

ACCORDINGLY:

Defendant City of Hammond's motion to dismiss plaintiffs' first amended complaint [DE 23] is DENIED.

SO ORDERED.

ENTERED: April 20, 2015.

/s/ Philip P. Simon
PHILIP P. SIMON, CHIEF JUDGE
UNITED STATES DISTRICT COURT